IN THE MATTER OF MATTHEW AND MARIA FERNANDA CESNIK LEGAL OWNERS AND PETITIONERS FOR VARIANCE ON THE PROPERTY LOCATED AT 907 ADANA ROAD	*	BEFORE THE BOARD OF APPEALS OF
1ST ELECTION DISTRICT 2ND COUNCILMANIC DISTRICT	*	BALTIMORE COUNTY
	*	Case No. 20-056-A

* * * * * * * * * * * * *

OPINION

This matter comes before the Board of Appeals (Board) as a *de novo* appeal from an opinion dated August 25, 2020, by Administrative Law Judge Paul M. Mayhew, denying a variance request. In that matter, as now before the Board, the Petitioners are requesting variance relief from Baltimore County Zoning Regulation (BCZR) § 100.6. The Petitioners want to keep and maintain two chickens on a lot that is 0.177 acres instead of the minimum one acre as required by § 100.6.

There are two sets of legal principles that govern this matter. The first is traditional Baltimore County zoning law regarding variances as set forth in *Cromwell v. Ward*, 102 Md. App. 691 (1995). The second is the American With Disabilities Act ("ADA") and the Americans With Disability Act Amendments Act of 2008 (ADAAA), 42 U.S.C. § 12101 *et seq.*, the Fair Housing Amendments Act (FHAA), 42 U.S.C. § 3601 *et seq.*, and the Maryland Discrimination in Housing Act, Ann. Code of Md., State Gov't. Art., § 20-701, *et seq.*, all of which require that a local jurisdiction's policies and procedures, including zoning requirements, must make reasonable accommodation for persons with disabilities in single family dwellings owned or occupied by a disabled person. *See also Pathways Psychosocial, et al. v. Town of Leonardtown, Md., et al.*, 223 F.Supp2d 699, 707-09 (D.Md. 2002) (finding that use of zoning

laws to discriminate under the ADA supported private cause of action and substantial jury award).

Mrs. Cesnik suffers from stage IV rectal, lung, and liver cancer. The Cesniks first acquired the chickens when they lived in Indiana, and the chickens were to be a source of comfort for Mrs. Cesnik. The chickens are pets, not part of a commercial operation. The Cesniks moved to the Pikesville area of Baltimore County several years ago. Mr. Cesnik indicated that their real estate agent told them that chickens were permitted in their new neighborhood which is correct so long as there is at least one acre of land to support those chickens. Apparently, the acreage requirement was not disclosed to the Cesniks.

After settling into their home, a neighbor complained about the chickens. As a result, the Cesniks filed their application for variance relief from the requirements of § 100.6. They also undertook to reconfigure their backyard chicken coop and outdoor feeding area. These changes re-oriented the chickens away from the complaining neighbor. They also presented evidence to the Board showing that the methods they used to care for the chickens caused little or no disruption in the neighborhood. Several neighbors testified to the same effect, indicating that they support the Cesniks in keeping the chickens. The original complaining neighbor has since moved away. Mr. Cesnik testified that the new owners do not object to the chickens. The Cesniks' devotion to these chickens (who all have names) was underscored by testimony that the Cesniks attempted to procure a prosthetic beak for one of the chickens whose top beak had broken off.

As indicated above, the Cesniks have requested variance relief from the one acre requirement in § 100.6. Under *Cromwell*, there is a two-step process to determine if a variance

is warranted. First, the petitioner must demonstrate that the property is unique in relation to the surrounding properties, and this uniqueness is what necessitates variance relief. Secondly, the petitioner must show that without the requested relief, the petitioner will experience a practical hardship not of the petitioner's own making. 102 Md. App. at p. 694-95. In this instance, the *Cromwell* standard is clearly **not** met. First, there is nothing unique about the property. It is a home and lot that is typical in the area, and nothing distinguishes it in relation to the maintenance of chickens. Secondly, though the Cesniks would incur an emotional hardship were the chickens to be ordered removed, there is no hardship that relates to the use and enjoyment of their property within the meaning of *Cromwell*. Additionally, whatever hardship that may exist is arguably of their own making. Though they apparently received misinformation from their real estate agent about the legality of keeping chickens, the zoning requirements are a matter of public record, and the Cesniks are charged with knowledge of those requirements. Finally, we note that variances run with the land. If we were to grant a variance allowing chickens to be kept at the Adana Road property, then any subsequent owner of that property would also have the right to maintain chickens for any purpose, including a commercial purpose. This would be an unfortunate, unjustified, and clearly ill-advised consequence.

Though the Petitioners are not entitled to a variance, the Board is not unmindful of the rather unique situation presented in this matter. The chickens in this case are not simply pets; they are pets which provide a great source of comfort, companionship, and solace to a woman who is gravely ill. The Board is also aware of its obligations under prevailing law regarding individuals with disabilities. And while it would have been far preferable for the Petitioners to

have themselves raised alternative bases for them to achieve their desired outcome, or to have engaged counsel to do so in a way that would have assisted the Board, we can on our own, recognize, consider, and adhere to important Federal and State jurisprudence where appropriate. In this instance, the Board is of the view that it should and can carve out a limited accommodation under the Americans With Disabilities Act and the Americans With Disability Act Amendments Act (ADA and ADAAA), 42 U.S.C. §§ 12131, *et seq*. The Board has taken a similar approach in at least one other case where the Petitioner had not specifically raised the ADA. *See In re McBride*, CBA No. 17-270-A (standards of side setback relaxed in order to permit a residential addition necessitated by the need to accommodate two wheelchair-bound foster sons who also had major cognitive and emotional disabilities).

The ADA requires public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity". *Wisconsin Community Services, Inc, et al. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006) (Easterbook, J., concurring, quoting Department of Justice regulation 28 C.F.R. § 35.130(b)(7)). Significantly, municipal zoning constitutes a public "program" or "service" as those terms are used in the ADA. *Wisconsin Community Services, Inc, et al. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir. 2006); *Innovative Health System, Inc. v. City of White Plains*, 117 F.3d 37,48-49 (2d Cir. 1997). The ADA defines "public entity" to include ". . . any department, agency, special purpose district, or other instrumentality of a State. . .or local government". § 12131 (1)(B). And enforcement by a local government of zoning regulations is action by a "public entity".

Innovative Health System, Inc. v. City of White Plains, *supra*. 117 F3d at 44. *See also Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 45-46 (2nd Cir), *cert. denied*, 537 U.S. 813 (2002); *Forest City Hous., Inc v. Town of North Hempstead*, 175 F.3d 144, 151 (2nd Cir. 1999); *Tsombanidis, et al. v. City of West Haven, et al.*, 352 F.3d 565, 573-73 (2nd Cir. 2003); and *Smith-Berch, Inc. v. Baltimore County*, 68 F.Supp.2d 602, 618 (D.Md. 1999). *See also Ann. Code of Md.*, State Govt Art. § 20-706(b)(4) (indicating that under Maryland law, as under ADA at 42 U.S.C. § 12131(2) and the FHAA at 42 U.S.C. § 3604(F)(3), the disabled are entitled to ". . .reasonable accommodations in rules, policies, practices, or services when the accommodations may be necessary to afford an individual with a disability equal opportunity to use and enjoy a dwelling"). As demonstrated, the definitions in the ADA, the related statutes, and the caselaw establish that the zoning enforcement apparatus of Baltimore County as well as this Board are "public entities". Similarly, actions taken by the County zoning authorities and this Board are implementation of public "programs", "practices", and/or "services" within the ADA. In other words, in making a zoning decision, local zoning authorities must interpret the zoning principles that apply to private dwellings to reasonably accommodate a person with disabilities who inhabits that dwelling. Consequently, if Mrs. Cesnik is disabled within the meaning of the ADA, then this Board can and should accommodate her situation.

There are no hard and fast criteria for what constitutes a disability, and whether a disability exists is to be determined on a case-by-case basis. *See A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 361 (4th Cir. (Md.) 2008) (holding that whether a recovering addict is "disabled" under the ADA is a question of fact). Of course, any analysis must begin with the operative statutory definitions. The ADA defines a disability as ". . . a physical

impairment. . . that substantially limits one or more major life activity. . ." § 12102(1)(A). "Major life activity" itself includes almost every aspect of normal daily living like eating, sleeping, walking, bending, breathing, concentrating, and the like. § 12102(2)(A). It also includes ". . .functions of the immune system, normal cell growth, brain, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." § 12102(2)(B). The ADA commands that the terms "disability" and "substantially limits" are to be liberally construed. §§ 12102(4)(A) and (B). In fact, effective January 1, 2009, Congress enacted changes to the ADA in order to undo limitations that had been imposed by the Supreme Court and other federal courts. *Hoffman v. Carefirst of Fort Wayne, Inc.* 737 F.Supp2d 976, 984 (N.D. Ind. 2010) citing revisions to § 12102(4) which, for example, expanded the definition of disability to include an impairment that is "in remission" if the impairment would "substantially limit a major life activity when active". *See* ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008). *And see* 29 C.F.R. §§ 1630.2(g)-(h) further refining the definitions of "disability", "physical or mental impairment" and "major life activities" under the ADA and ADAAA and emphasizing that those definitions should be "broadly construed in favor of expansive coverage".

The nature of Mrs. Cesnik's health condition in this case is uncontested. There is little doubt that Stage IV cancer of any sort constitutes a major disruption of everyday functioning and is, therefore, a disability within the ADA. This is particularly true where the cancer involves the rectum, lungs, and liver. Indeed, even a much less impactful cancer can be a disability for employment purposes under the ADA. *See* 2009 WL 2171549 (E.E.O.C.)

announcing a settlement of $125,000 paid by a White Marsh, Maryland medical group for refusing to retain an employee who had recovered from breast cancer surgery.

Having established that Mrs. Cesnik is disabled and that actions by the Board must account for the ADA, it is then necessary to determine what measures should be taken to properly accommodate the applicable zoning restrictions to her situation. Clearly the number of chickens that the Cesniks own should not be increased. They should maintain the mitigation strategies that they have already instigated to minimize the impact on their neighbors. To the extent that any impacted neighbor does have complaints, the Cesniks must make good faith efforts to satisfy such complaints. The Cesniks have not been using the chickens for commercial purposes, and that self-imposed limitation is now a requirement. Finally, the right to keep the chickens is coexistent with the disability, and should the disability end, the right to keep and maintain the chickens does as well.

CONCLUSION

For these reasons, we are permitting the Cesniks to keep and maintain the chickens subject to the conditions described above and recited in the Order accompanying this decision.

ORDER

THEREFORE, IT IS THIS 5th day of April, 2021 by the Board of Appeals of Baltimore County

ORDERED, that the variance to permit keeping and maintaining chickens in a lot smaller than one acre as required by BCZR § 100.6 is hereby **DENIED**; and

IT IS FURTHER ORDERED that the Petitioners may keep and maintain the chickens they presently house subject to the following conditions:

1. The number of chickens cannot be increased;
2. The chickens cannot be used for commercial purposes;
3. The Petitioners must maintain the mitigation strategies already employed to minimize and untoward impact on neighboring properties or the people who inhabit those properties.
4. The Petitioners must make good faith efforts to resolve any complaints that individuals on adjoining properties may have; and
5. Any authority to keep and maintain any chickens will cease if and when the disability in question should cease or no longer be relevant.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

William A. McComas, Panel Chair

see following page
Joseph L. Evans

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

See previous page
William A. McComas, Panel Chair

Joseph D. Evans

IN RE: PETITION FOR VARIANCE 907 Adana Road 1st Election District 2nd Council District Mathew P. and Maria F. Cesnik Legal Owners and Petitioners	*	BEFORE THE
	*	BOARD OF APPEALS
	*	OF
	*	BALTIMORE COUNTY
	*	CASE NO: CBA-2020-0056-A

* * * * * * * * * * * * *

O P I N I O N CONCURRING IN PART AND DISSENTING IN PART

The majority determined that two sets of legal principles govern this matter. During the public deliberation, I voted with the majority to deny the Petitioners requested variance and concur with the reasons set forth in the majority opinion. The majority then voted to grant Petitioners a right to keep their chickens pursuant to Americans With Disabilities Act and/or other law pertaining to service animals. At that point, I declined to join the majority without any briefing or argument on the applicability of the foregoing law since the Petitioners had not raised it as a basis for seeking relief. I am not persuaded by the majority opinion and therefore dissent from the majority's decision to allow Petitioners to keep the chickens.

April 5, 2021
Date

Adam T. Sampson
Adam T. Sampson

Board of Appeals of Baltimore County

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April 5, 2021

Matthew and Maria Fernanda Cesnik
907 Adana Road
Pikesville, Maryland 21208

RE: *In the Matter of: Matthew and Maria Fernanda Cesnik*
Case No.: 20-0256-A

Dear Mr. and Mrs. Cesnik:

Enclosed please find a copy of the final Majority Opinion and Order, and the Opinion Concurring in Part and Dissenting in Part, issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosures

c: Jessica Skillman
Office of People's Counsel
Paul M. Mayhew, Managing Administrative Law Judge
Stephen Lafferty, Director/Department of Planning
C. Pete Gutwald, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
James R. Benjamin, Jr., County Attorney/Office of Law